Status of 'Gist of the Action' in Legal Malpractice Claims Following '*Swatt v. Nottingham Village*'

How the "gist of the action" doctrine applies in the context of legal malpractice cases is a question in flux in Pennsylvania. The gist of the action doctrine is a common-law rule used in Pennsylvania to distinguish between claims in tort versus contract. Its purpose has been to prevent litigants from recasting contract claims as torts (or vice versa) simply to take advantage of different remedies, damages or statutes of limitations.

The Legal Intelligencer
September 19, 2025
By Alesia S. Sulock & Josh J.T. Byrne

How the "gist of the action" doctrine applies in the context of legal malpractice cases is a question in flux in Pennsylvania. The gist of the action doctrine is a common-law rule used in Pennsylvania to distinguish between claims in tort versus contract. Its purpose has been to prevent litigants from recasting contract claims as torts (or vice versa) simply to take advantage of different remedies, damages or statutes of limitations.

Historically, as a general matter, without referring to it as "gist of the action," courts applying Pennsylvania law held that in the context of a professional malpractice action, when a plaintiff does not allege a specific breach of a term of the contract, the gist of the action is in tort. This meant that you could not extend the two-year statute of limitations for a legal malpractice claim sounding in negligence simply by stating the attorney breached the contract governing the attorney-client relationship because they did not meet the applicable standard of care. Prior to 1993, the distinction between legal malpractice claims sounding in tort as opposed to those sounding in contract was clearly defined by our courts. See, *Storm v. Golden*, 538 A.2d 61, 65 (Pa. Super. 1988) ("the breach of contract count does not allege that appellee failed to follow specific instructions nor that a breach of a specific provision of the contract occurred."); See *Duke & Company v. Anderson*, 418 A.2d 613, 616 (Pa. Super. 1980) ("the client has a choice: either to sue the attorney in assumpsit, on the theory that the attorney by failing to follow specific instructions committed a breach of contract; or to sue the attorney in trespass, on the theory that the attorney failed to exercise the standard of care that he was obliged to exercise."); *Hoyer v. Frazee*, 470 A.2d 990, 992 (1984) ("The Hoyers did not allege that the appellees failed to follow specific instructions ... and did not aver a breach of a specific provision of their contract with appellees. Thus, we do not believe that the first count of the Hoyers' complaint states a true contract cause of action. Rather, the entire complaint sounds in negligence; that is, the appellees failed to exercise the appropriate standard of care."). The settled law was that a legal malpractice action sounding in breach of contract could only be maintained when there was an allegation that the attorney failed to follow a specific instruction

of the client and could not be based upon generalized allegations of negligence.

In 1993, our Supreme Court issued its opinion in *Bailey v. Tucker*, 621 A.2d 108 (1993). In *Bailey*, during a discussion of breach of contract claims, the court stated "an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large." This dicta, if accepted as a holding of *Bailey*, represented an apparent significant change in the law as it had existed for years. *Bailey* was then compounded by the opinion in *Gorski v. Smith*, where the court stated that following *Bailey*:

> A plaintiff's successful establishment of a breach of contract claim against an attorney ... does not require proof by a preponderance of the evidence that an attorney failed to follow a specific instruction of the client ...

Gorski did not address the gist of the action doctrine. Neither the court nor counsel in briefing on *Gorski* asserted that the requirement that a breach of contract claim be grounded in a breach of a specific contractual provision arose from the gist of the action doctrine. The court was never provided with argument on gist of the action. The *Gorski* court reviewed the holdings in *Duke, Hoyer,* and *Rogers*, but held that the "restrictive view ... that a legal malpractice claim for breach of contract is limited solely to those instances in which the plaintiff can show that the attorney failed to follow a specific instruction of the client, no longer has continuing vitality in light of the Supreme Court's more recent ruling in the case of *Bailey v. Tucker*." Together, *Bailey* and *Gorski* created a significant change in Pennsylvania legal malpractice law, effectively eliminating the distinction, other than with respect to damages, between legal malpractice claims sounding in tort and claims sounding in breach of contract. The word "gist" appears in neither decision.

In *Bruno v. Erie Insurance*, 630 Pa. 79, 82, 106 A.3d 48, 50 (2014), the Pennsylvania Supreme Court, relying on the gist of the action doctrine, clarified that the key inquiry is: what specific duty is alleged to have been breached—is it a duty arising from a specific executory promise in contract, or is it a broader social duty (i.e., tort)? Following the Supreme Court's decision in *Bruno*, courts moved back to applying the traditional distinction between negligence and breach of contract claims. Unless a legal malpractice action arises out of a breach of a specific executory provision of the attorney-client agreement, the action sounds in tort. The U.S. Court of Appeals for the Third Circuit made a thoughtful analysis of the state of this issue following the *Bruno* decision in *New York Cent. Mutual Insurance v. Edelstein*, 637 F. App'x 70, 74 (3d Cir. 2016). The court refused to apply a contract statute of limitations stating: "The gravamen of the appellants' allegations is that counsel negligently performed his undertaking as a retained lawyer and thus failed to exercise the appropriate standard of professional care." The court rejected the plaintiff's contention that a generalized statement of negligence was sufficient to state a breach of contract claim based upon *Bailey* stating: "However, given the Pennsylvania Supreme Court's delineation of contractual and tort claims in *Bruno*—according to which a claim sounding in contract is founded on the breach of 'specific executory promises'—we decline to read the court's dicta in *Bailey*

as establishing a distinct contractual promise upon which a breach of contract claim may be premised."

The Pennsylvania Superior Court, in an en banc decision recently clarified what is necessary to assert a viable contract claim. See *Swatt v. Nottingham Vill.*, --- A.3d. ----, 2025 PA Super 138 (July 2, 2025). *Swatt* involved claims by the estate of a deceased nursing home resident (through its personal representative) against the nursing home. The claims included breach of contract. The trial court dismissed the breach of contract claims on the ground that they were really tort claims in disguise and thus time-barred under the tort statute of limitations.

The Superior Court took *Swatt* up en banc and found that the gist of the action doctrine did not bar the breach of contract claim. As the court noted in the *Swatt* opinion, the "gist of the action doctrine" does not "convert" tort claims to contract claims, and that a party may have both a tort claim and a contract claim in the same action, however, in order to maintain a breach of contract claim there must be "specific promises in the contract, i.e., contractual duties sufficient to maintain breach-of-contract claims."

In *Swatt*, the plaintiff alleged that the defendant nursing home breached a specific term of their contract—that the defendant nursing home promised in the contract, but failed to provide the resident with a "room, meals, housekeeping services, use of walker or wheelchair when medically necessary, nursing care, linen and bedding, and such other personal services as may be required for the health, safety, welfare, good grooming and well-being of" the resident. The Superior Court majority, quoting *Bruno*, determined that the plaintiff's breach of contract claims were "particular claims ... that the duties breached were ones created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—and the claims are to be viewed as ones for breach of contract." The Superior Court further explained that:

> After *Bruno*, Pennsylvania courts must review each claim individually to determine whether the plaintiff has alleged or offered sufficient proof (depending on the stage of the proceedings) that the defendant breached the particular duty (tort or contractual) for each particular claim. If so, the claim proceeds to trial. Courts should keep in mind that there are instances when a single gist of the action (one unlawful act) breaches both a general duty of care, as well as an expressed or implied contractual duty. While double recovery for the same unlawful act is generally prohibited, multiple claims can proceed to trial, if timely filed.

The bottom line is that while it is not to be called the "gist of the action," the Superior Court en banc reaffirmed that in order for a breach of contract claim to survive, it must be based on a specific and express contractual promise. If the claim is merely that the defendant failed to perform obligations implied by law (or general duties), that alone is not sufficient for a valid breach of contract claim under Pennsylvania precedent.

The *Swatt* majority decision highlights the importance of distinguishing between implicit or implied duties (e.g., general duties of care) and express contractual promises.

Where a claim is based on express contractual duties, the breach can be asserted as a contract claim. Where duties are more general (outside of express terms), a tort claim is appropriate.

One of the big unresolved questions that remains for legal malpractice claims is whether implied contractual duties ever suffice for a breach-of-contract claim as the court found in *Gorski* relying on *Bailey*. *Swatt* does not squarely settle whether duties that are implied in a contract, rather than set out in an express executory promise, can ever sustain a breach-of-contract claim. The majority in *Swatt* appeared to follow the historical analysis that requires a breach of a specific executory provision in the contract, while at the same time stating that "contract claims never were, and are not now, subject to the gist-of-the-action doctrine." However, the language quoted above, appears to leave some room for a breach of contract claim based upon an implied contractual duty. Judge Victor Stabile specifically wrote in his concurrence that an implied contractual duty cannot be sufficient to sustain a breach of contract claim, and that the majority was incorrect that the Gist of the Action Doctrine cannot be used to preclude breach of contract claims. Judge Megan King agreed with Stabile and disagreed with the majority "to the extent it holds that the breach of only implied contractual duties may be sufficient for a breach of contract action." All of this seems to suggest that the violation of an implied duty of care cannot sustain a breach of contract claim. The Superior Court still has the *Poteat* case under en banc review, which is a legal malpractice case involving gist of the action. That opinion may clarify the issue when it comes out.

Alesia S. Sulock, a shareholder with Marshall Dennehey, is a member of the professional liability department where she focuses her practice on the defense of claims made and suits brought against attorneys, including legal malpractice claims, Dragonetti suits, abuse of process claims and disciplinary matters. Contact her at assulock@mdwcg.com.

Josh J.T. Byrne is a shareholder at the firm where he represents attorneys in civil and disciplinary matters. He is the chair of the Pennsylvania Bar Association's professional liability committee and co-chair of the amicus curiae brief committee, the co-chair of the Philadelphia Bar Association's professional responsibility committee, and former co-chair of the professional guidance committee. Contact him at jtbyrne@mdwcg.com.